



## US AND AFGHANISTAN: THE IMPORTANCE OF ACCOUNTABILITY

### Introduction

The United States has a proud history of commitment to international justice, most notably in the groundbreaking trials after the end of World War Two, Nuremberg and Tokyo. In particular, the American government was a driving force in the prosecution and sentencing of Nazi war criminals in the Nuremberg Trials, which created the conditions for a climate of international justice. After the Cold War, the United States was also one of the strongest supporters of recent ad-hoc criminal tribunals, from the former Yugoslavia to Rwanda. Not quite a century after the precedent was set in Nuremberg, the American government may turn away from holding the perpetrators of atrocities accountable through international justice. This commitment to international justice is once again at stake with the International Criminal Court's (ICC) preliminary investigation into Afghanistan and alleged crimes committed by United States military and intelligence officials there. If the ICC moves toward an official investigation, supporters of the ICC in the United States must be ready to advocate for the necessity of the Court and its alignment with truly American values.

The Bush Administration evolved from a policy of aggressive hostility toward the International Criminal Court to a much softer stance, demonstrated by its decision to not use its veto power in the Security Council's referral of the situation in Sudan to the ICC. While Obama adopted an increasingly positive approach to the ICC, ratification of the Rome Statute is still a far-off goal despite overwhelming public opinion in favor of increased participation. The ratification of international treaties is a difficult process politically, and, in the United States, it is further complicated by the provisions of the Constitution.

The United States' relationship with the Court has always been complicated: while Clinton supported the Rome Statute, he ultimately decided not to send it to the Senate for ratification. The American Servicemembers Protection Act (ASPA), the brainchild of Senator Helms that was eventually modified and supported by the Bush Administration, came at a time

when the official United States position toward the Court was at its most hostile. Despite some amendments in recent years, this act still remains in place. Obama's rapprochement was a heartening sign, but there is still a lot to be accomplished.

Although crimes committed on American territory are off limits in terms of the Court's jurisdiction, this is not the case if American nationals commit crimes on the territory of a State Party to the Rome Statute. The Court has jurisdiction over the territories of its States Parties. In the ongoing preliminary examination into Afghanistan, some of the primary individuals that would potentially be accused – in addition to officials from both the Taliban and the Afghan government, respectively – are American military and CIA officials.

### Background

The International Criminal Court was founded in the spirit of the Nuremberg trials and their situation-specific successors, the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. Furthermore, the international community convened to create the ICC to address the continued perpetration of mass atrocities across the globe. Perhaps most notably, the Court tries only individuals, not governments. With purely prospective jurisdiction from the Rome Statute's entry into force in 2002, the ICC is a court of last resort; it will try those with greatest accountability for the gravest crimes, but only if the national judicial process is deemed a sham, incapable or unwilling. All states have the chance to exercise complementarity, that is, to try their own citizens in their national legal system. The Rome Statute gives judges the capacity to accept a state's claim to first investigate and potentially try accused persons itself.

Post September 11, the United States adopted many counter-terrorism measures, including what has come to be known as 'enhanced interrogation.' It is widely accepted – by NGOs, the international community, and most Americans – that this was torture.

In 2007, the then-Prosecutor publicly announced that he was undertaking a preliminary examination of alleged crimes against humanity and war crimes committed in Afghanistan since 2003. Afghanistan deposited its instrument of accession to the Rome Statute in February of 2003. This enabled the Court to have jurisdiction over ICC crimes committed in Afghanistan as of May of that year.

After the September 11 attacks, the United States led an international coalition in ground operations and air strikes in Afghanistan against the Taliban, thought to be facilitating Al Qaeda

operations. The Taliban lost control by the end of the year, and a nascent governing body was subsequently established: the Afghan Transitional Administration. Despite the establishment of a sovereign government, hostilities with the Taliban continued, primarily in the south of the country, which is what led to the involvement of NATO, and primarily US, forces in the situation.

The situation in Afghanistan is considered a conflict of non-international nature, as it was a civil war between the Afghan government – supported by ISAF and US forces – and non-state armed groups, particularly the Taliban. Despite the involvement of international forces, the character of the conflict remains non-international because they were supporting the national government. The alleged war crimes therefore fall under the types of war crimes specific to an armed conflict of a non-international character in the Rome Statute.

All three major players in this conflict –the Afghan transitional government, the Taliban, and US officials – are under examination for alleged crimes as the Rome Statute requires that the Prosecutor examine all parties in a given situation. The Prosecutor’s investigation does not unfairly target American officials, but rather duly acknowledges the allegations of crimes of United States nationals. The conditions in Afghanistan will make obtaining evidence of the alleged crimes by any party will prove to be difficult, but not impossible.

#### How does this involve the US?

The United States is not party to the Rome Statute, but Afghanistan is a party and thus crimes committed on Afghan territory fall within the Court’s jurisdiction. As noted, the ICC has jurisdiction over any Rome Statute crimes that the US or other participants in the conflict may have committed in Afghanistan or on the territory of other States Parties but related to the situation in Afghanistan. In this case, alleged crimes were committed on black sites in Poland, Lithuania, and Romania, all of which are States Parties to the Rome Statute and thus within the Court’s jurisdiction. Many of the alleged crimes, perpetrated by foreign and mainly American forces, arise from interrogation and the suspected use of torture.

According to the Prosecutor’s 2016 Report on Preliminary Examination Activities, “in the course of interrogating these detainees, and in conduct supporting those interrogations, members of the US armed forces and the US Central Intelligence Agency (“CIA”) resorted to techniques amounting to the commission of the war crimes of torture, cruel treatment, outrages

upon personal dignity, and rape.” The majority of these alleged crimes were committed between 2003-2004, although the maltreatment could have occurred as late as 2014. The alleged crimes appear widespread and systematic, not simply the work of a few individuals, but rather a policy or general approach. As planned and calculated actions, these alleged crimes, perpetrated on a large scale, are well within the ICC’s jurisdiction.

The Rome Statute stipulates that the Court will only try those with the greatest and primary accountability. Thus, the Court would not target the average American soldier who handled Afghan detainees, as he or she would have simply been at the bottom of a long chain of command. Instead, the Court’s focus would be on high-ranking American military and intelligence officials. Individuals with this degree of power and influence, often go unpunished for heinous actions, which is precisely what the Rome Statute aims to prevent.

In terms of complementarity, US civilian and military courts are expected to exercise their jurisdiction over crimes committed by US nationals abroad. However, this requires willingness and ability to do so. Neither the suspected American military officials nor CIA officers have been tried for any of the alleged crimes, despite a Justice Department inquiry into maltreatment of detainees. This inquiry resulted in a 2012 decision not to prosecute individuals for the deaths of prisoners in either Iraq or Afghanistan. As a result of that decision, there is no room for complementarity and this case becomes admissible for the Court’s jurisdiction. The ICC trial of senior American military and intelligence officials would be unprecedented, and, some would say, supersede the Constitution and national legal system. The Rome Statute has simply adopted customary international law and codified it through the creation of the Court: a state has the right to try anyone who commits a crime on its territory. The US, not being party to the Rome Statute, has quietly attempted to dissuade the Prosecutor, and would most likely take any and all measures to avoid the Prosecutor opening a full-fledged investigation. This could however change under the new administration.

#### What are the next steps for the Court?

The Office of the Prosecutor (OTP) is currently deliberating whether to request an authorization from the Pre-Trial Chamber for a formal investigation into the situation in Afghanistan. If the Prosecutor decides to submit such a request to the Pre-Trial Chamber, this indicates that she believes she has found sufficient evidence to get her request approved. An

obstacle facing the Prosecutor is the acquisition of sufficient evidence. In the wake of Ms. Bensouda's predecessor Luis Moreno Ocampo, and his laxer approach towards evidence, the Court's judges now demand sufficient evidence from the start. The provision of trial worthy evidence in the early stages of the examination only makes Prosecutor Bensouda's job more difficult. However, this more stringent requirement from the judges means that if she does request the opening of an investigation, she does so with strong evidence. The preliminary examination is still in its third phase: the determination of admissibility. If the Pre-Trial Chamber agrees with the Prosecutor on admissibility, it will then order arrest warrants. At any time, the United States can claim complementarity and initiate investigations, and – if warranted – prosecution and trial, which would at least temporarily halt the ICC investigation.

#### What can we expect with the new administration?

The *American Service-Members Protection Act* of 2002 gives the Trump administration legislative authority to oppose the Court. However, if the Prosecutor goes ahead with her investigation, the US may object strenuously, but in reality would face arrest warrants for the accused. This could evolve into a tense stalemate since the government would presumably resist these warrants. As the United States has launched no serious investigation into these crimes, let alone pursued trials, the International Criminal Court's jurisdiction over these crimes is admissible under the Rome Statute- unless the United States calls for complementarity.

It is unknown whether the Trump administration will oppose the Court, however he and many of his political appointments have already made their disdain for international organizations clear. As the administration has been erratic and unpredictable thus far, it is likely that the ICC will simply not be a top priority if there is nothing that calls its attention to the Court. The opening of a formal investigation into American war crimes in Afghanistan, however, would certainly do that.

#### What is the importance of the continuation of this investigation for the Court?

The continuation of the preliminary examination of Afghanistan, and the resulting investigation, if authorized, would constitute a monumental moment in the ICC's history. Such an investigation would be the first in which the Court has considered jurisdiction over US personnel. Not only will the Court be taking a sensational case from beyond Africa, the continent

which is overwhelmingly represented within the Court's preliminary examinations, investigations, and full-fledged cases, but would also investigate a powerful western country for the first time. The focus of the Court would undergo a shift from the developing world to the developed, from dictatorships toward democracies; a necessary change, and one that echoes the universal mandate of the Court. No person, nor government, is above its rules. Article 27 of the Rome Statute articulates that the Statute applies "equally to all persons without any distinction based on official capacity." The Court also does not recognize informal hierarchies among states. This would set an important precedent: developed, Western countries are no less accountable for their actions than their developing, non-western counterparts. In a time where many African nations are expressing discontent at what they consider a systematic targeting of African individuals by the Court and a consequent desire to withdraw, this case would demonstrate that the Court's scope is truly universal and not limited to the Global South.

As the United States has not ratified the Rome Statute, due to certain flaws within the Statute that former President Clinton pointed out, it is unsurprising that there would be uproar from both the administration and the public if the Court issues arrest warrants for Americans. Critics of the ICC could condemn this as an infringement of sovereignty, with claims that the Court is overstepping the national judicial system, and that it is unconstitutional. However, the continuation of this examination and subsequent investigation would send an important message: The United States is not above international law, and as a member of the international community, must abide by the same legal norms as every other state. International law establishes that certain acts constitute crimes; the Rome Statute goes further and classifies the most horrendous of crimes as within the ICC's jurisdiction. The Prosecutor has every right to continue her examination as she is tasked by the Rome Statute to investigate alleged crimes within the Court's jurisdiction.

The United States' reluctance in supporting the ICC would not protect it from facing the Court's jurisdiction as this ongoing examination demonstrates. In cases where Americans commit atrocities on the territory of states party to the Rome Statute, these individuals are open to prosecution. The US might think that it is protecting US nationals, but in fact it is preventing the pursuit of justice regarding any potential crimes committed on American soil. In trying to go above the law, and the universal accountability that the Court aims to provide in a world riddled with conflict and atrocities, the US government would only weaken the international system that

is in place to protect the global community, including Americans. Because of their values, Americans support justice and the defense of human rights, including the work of international organizations that aim to uphold these ideals. Many Americans recognize that the ICC serves the interest of those that have suffered at the hands of individuals with power, the very victims of atrocities, and in turn, it hopefully deters these abhorrent sorts of crimes from recurring.

At a time when some question the effectiveness of international institutions like the Court, this is a necessary reminder that these institutions that are in place to protect us all depend on state cooperation. The opening of an investigation by the Prosecutor would assert the Court's role globally. If the ICC did not fulfill its mandate to investigate horrendous crimes, it would only prove recent criticisms correct. The decision to continue with an investigation, in spite of American attempts to deter this, would actually demonstrate the apolitical nature of the Court.

If the United States cooperates with the Prosecutor, and does not try to sabotage or halt the imminent investigation, this would be a victory for both international justice and the Court's legitimacy. The proper, well-intentioned exercise of complementarity would not sabotage the investigation, however, it would allow the United States to ensure that justice is served through domestic measures. It is in the national interest of the United States to encourage the international rule of law, and the ICC is a huge step towards this.

### How to advocate for the Court in the United States in light of the Afghanistan situation?

The Afghanistan situation would be the first case in which the United States risked having its officials charged by the ICC. For American critics of the Court, this is the worst-case scenario and precisely what they have been fighting against. For our advocacy, the emphasis has to be on the pursuit of justice and standards of international justice over misplaced nationalism that fears outside interference in American matters. Rather than viewing national pride as inherently at odds with the Court's mission, it is crucial to understand that our national pride rather requires the American government to support international justice. The ICC's role in bolstering the international system overall cannot be overlooked as a vital American policy interest. A strong international system is beneficial to everyone and moreover a reality today. Thus, the United States cannot pick and choose what institutions or laws it abides by.

If the Prosecutor decides to open an investigation, the United States has two options: cooperate with the Court or begin American investigations, and trials, if necessary. We might say that the pursuit of justice both serves American national interest and expresses an intrinsically American value. The United States can either pursue this domestically or let the ICC do it. The Court would have no need to proceed if justice was upheld in our domestic court systems in the first place. If there are perpetrators of widespread atrocities, regardless of nationality or position, they should be prosecuted in a court of law.

AMICC alliances and members should inform themselves and their constituents on the preliminary examination into Afghanistan and specifically what crimes United States officials have allegedly committed in Afghanistan and against Afghan nationals. This is a starting point for discussion, and the perfect time to disseminate information on the Rome Statute and the workings of the Court. What are the next steps for the Prosecutor? If an investigation is opened, what happens from there? Moreover, there are measures that the United States can take to prevent any arrests or subsequent trials: complementarity. If the implicated persons are investigated and either justifiably absolved or tried in American courts, then the International Criminal Court will not intervene. The principle at stake here is not so much sovereignty as the pursuit of justice, which is an ideal so inherent in American values that it becomes an inseparable part of the exercise of true sovereignty. The alleged crimes were not isolated incidents, rather they were part of a systematic approach to intelligence acquisition over the span of many years (and potentially two administrations). No one can or should get away with human rights abuses. If the American government does not want the International Criminal Court to investigate and try Americans, then it must do that itself. To achieve this, the American public has a more important role than ever: advocate for justice, call for accountability, and demand that the United States government holds its officials responsible for violations of human rights, either through domestic trials or at the International Criminal Court.

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